United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-5041

To be argued by
GARY L. BLUM

IN THE

United States Court of Appeals

For The Second Circuit

In the Matter of
ROBERT A. MARTIN a/k/a R. ALLAN MARTIN a/k/a
ROBERT ALLAN MARTIN,
Bankrupt-Appellant.

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P/S

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, HONORABLE EDMUND L. PALMIERI, DISTRICT JUDGE

BRIEF FOR TRUSTEE IN BANKRUPTCY-APPELLEE

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Robert A. Martin a/k/a R. Allan Martin a/k/a Robert Allan Martin,

Bankrupt-Appellant.

Appeal From the United States District Court For the Southern District of New York, Honorable Edmund L. Palmieri, District Judge

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BRIEF FOR TRUSTEE IN BANKRUPTCY-APPELLEE

STATEMENT OF THE ISSUES

(1) Did the Bankrupt keep and preserve sufficient records from which his financial condition could be ascertained? If not, did the Bankrupt justify his failure to keep and preserve such records under all the circumstances of the case?

(2) Did the Bankrupt sustain his burden of proving that he has not committed any of the acts proscribed by Bankruptcy Act Section 14c(2) (11 U.S.C. Sec. 32c(2))?

(3) Was the Bankruptcy Judge's decision denying a discharge in bankruptcy "clearly erroneous"?

(4) Can the length of these proceedings be said to have unduly prejudiced the Bankrupt?

STATEMENT OF THE CASE

This is an appeal from a decision of the Bankruptcy Judge affirmed by District Judge Edmund L. Palmieri, that the Bankrupt, Robert A. Martin, was not entitled to a discharge in bankruptcy. The ground for the denial was that the Bankrupt failed to comply with Section 14c(2) of the Bankruptcy Act.

Examination in the form of the first meeting and adjourned first meeting were conducted by the Trustee in Bankruptcy in an effort to piece together, from the scanty records produced by the Bankrupt, his financial condition and business transactions. Unable to do so, the Trustee filed objections to the Bankrupt's discharge.

The Bankrupt, in an attempt to satisfy his statutory burden of demonstrating that he had not committed any of the acts proscribed by the proviso to Section 14c(2), merely made unsubstantiated assertions that his personal records were lost in transit by the warehouse in which he placed his records and that the records of his corporation, Robert A. Martin Associates, Inc. was an adequate substitute for his personal records. No facts or evidence were produced to support or verify these assertions. Inasmuch as the corporation ceased operations in 1962, its records could not be used to explain transactions after that date, whereas the Bankrupt's schedules in bankruptcy and state-

ment of affairs disclosed debts and obligations allegedly incurred in 1963, 1964 and 1965, thus requiring substantiation for said years.

The District Court affirmed the denial of discharge on the same grounds set forth in the Bankruptcy Judge's decision. Additionally, the District Court held that the Bankrupt had not been unduly prejudiced by the length of the proceedings. (366a, 367a, 370a)

STATEMENT OF FACTS

On March 4, 1965, the Bankrupt filed a voluntary petition in bankruptcy, schedules in bankruptcy and statement of affairs reflecting himself as a "business broker" and self-employed, having commenced such business in or about January, 1963. An Amended statement of affairs filed on September 9, 1966 with the Bankruptcy Court reflected "fees as a business broker which amounted to $13,570.00 in 1963 and $15,000.00 in 1964." (3a). The schedules in bankruptcy reflect unpaid creditors of the Bankrupt dating back as early as April, 1960 with a predominance of obligations incurred in 1963 and 1964.

The Bankrupt indicated that some of his personal transactions were reflected in the records and books of Robert A. Martin Associates, Inc., but he also testified that in 1962 Robert A. Martin Associates, Inc., a registered broker-dealer, in which the Bankrupt had an 80% interest, had ceased to do business because of an impairment of its working capital. (194a, 195a). Robert A. Martin Associates, Inc. was no longer able to operate as a broker-dealer because of the impairment of its capital and the Bankrupt "*** was put into the position of having to advance substantial sums of money as

loans to potential companies for underwriting issues" (196a). The Bankrupt further testified that he had been engaged in the purchase and sale of "millions of dollars" of securities for his personal account as a trader in securities, (265a) and that his personal "***trading activities, almost all of these trading activities were cleared through either Century Industries, Inc., or Tracon Corp., Inc. and in addition a portion, a smaller portion of the interim finance loan business conducted on behalf of Robert A. Martin Associates, Inc.***" (205a).

Robert A. Martin Associates, Inc., from 1962 on, did not purchase securities, did not borrow funds of any substance, and was in fact in liquidation, having ceased doing business in 1962. (227a, 228a). There were no loan transactions reflected in the Robert A. Martin Associates, Inc. books and records in 1963 (23[illegible], 231a) and no borrowings by said corporation in 1963 or 1964. The Bankrupt testified that Robert A. Martin Associates, Inc. had had no net income for 1963; that a final tax return had been prepared and filed in 1963 reflecting its out of business status, (235a, 236a) and that the corporation was operable only from 1960 until 1962.

The Bankrupt testified that he had been engaged in the purchases and sales of "millions of dollars" of securities for his personal account as a trader in securities (265a) yet

he acknowledged that he kept no ledger book of purchases and sales of securities or any journal thereof (266a-269a).

With respect to a record of the checks drawn by the Bankrupt for his personal account and an explanation for the drawing of checks and expenditures represented thereby, the Bankrupt testified that his personal check stubs for the years 1960, 1961, 1962 and part of 1963 were not delivered to the Trustee (219a) and that when he had discovered that the warehouse which contained the Robert A. Martin Associates, Inc. books and records had not delivered to the Trustee his personal checking account stubs, that he went through everything at the office of the accountants for the Trustee only to find that his personal stub books were not there (271a-273a). The Bankrupt did not check with the warehouse to determine whether all of the records had in fact been delivered to the Trustee. The significance of the Bankrupt's lack of records reflected upon the drawing of checks and the reason for the cashing thereof and was clearly demonstrated by reference to the testimony of the Bankrupt on cross-examination after having been presented with a group of checks drawn on his personal account at the Kings County Trust Company or the Hanover Bank. When exhibited a $14,670.60 cash check drawn on his Kings County Trust Company account, $32,142.55 drawn

and cashed at the Hanover Bank, and a $20,800.00 check drawn by the Bankrupt to his own order and cashed by him, the Bankrupt could not explain the issuance of the checks or the reasons for the expenditures, beyond an oblique reference to the fact that it probably was entered in a stub book which he previously testified had not been turned over to the Trustee (255a-257a). When questioned by the Court with respect to the specific checks, and as to what type of record was retained or made by the Bankrupt, the Bankrupt stated "There is none. The checks are eleven years old and there just isn't a record." (268a, 269a).

The accountant for the Trustee was called as a witness. The accountant testified that he examined the books and records of the Bankrupt which had been turned over to the Trustee or to the Trustee's counsel (22a, 23a); that all the records of the Bankrupt were in Court (24a). He had reviewed checkbook statements, and deposit slips covering the Bankrupt's bank account at the American Trust Company, and whatever other records had been turned over by the Bankrupt with respect to other bank accounts for the years 1960, 1961, 1962, 1963, 1964 and 1965. The accountant testified that he examined a package of miscellaneous money orders for the years 1963, 1964 and 1965, various folders containing brokerage statements and confirmations of trades in securities for transactions in 1961 and 1962, an account of the

Bankrupt with Tracon Corporation for the period March 8, 1961 through January 31, 1962 and an account of the Bankrupt with Tracon Corporation for the period July 1, 1960 through January 9, 1962 (25a-39a). The accountant was asked whether he examined the books and records of the Bankrupt placed in evidence for the year 1960 and answered in the affirmative (47a). When asked whether he had received any checkbooks for the Bankrupt for 1960, he answered that he had "not", nor had the accountant received any ledgers of the Bankrupt for the year 1960 (48a). The accountant testified that he examined all cancelled checks in his possession and tabulated them showing the dates of the checks, check numbers, the amount and payee (other than checks which were obviously checks used for the Bankrupt's personal living expenses). He examined checks which aggregated $413,319.99 for the year 1960 exclusive of checks for living expenses and stated, "I could not determine the nature of disbursements of checks during this period in the amount of $362,107.20" (48a,49a). The aforesaid sum included $46,813.15 in checks issued for cash, and $20,800.00 in checks issued by the Bankrupt to himself (48a, 49a). For the year 1961, the accountant testified that he went through the same process (50a). The total of all 1961 checks examined was $1,379,625.61, however, he was only able to determine the nature and purpose of $308,164.30 of the checks drawn,

leaving a balance of unidentifiable disbursements of $1,071,461.31 (51a). With respect to the examination of the Bankrupt's Irving Trust Company account for the year 1961, the testimony was that he had a complete transcript of the account from Irving Trust Company, but could not find among the Bankrupt's records, cancelled checks totalling $232,829.00 nor an explanation for debit memos in said account of $25,004.08 (51a, 52a). Of the sum of $1,071,461.31 in checks drawn in 1961 by the Bankrupt, $56,581.16 were issued to cash (52a). A similar tabulation of the available cancelled checks and bank statements marked in evidence for the year 1962 presented by the accountant revealed that of $1,181,492.15 in checks on the account of the Bankrupt, there was no explanation as to the nature and purpose of $729,701.14, and of the latter mentioned amount, $25,546.95 were issued to cash (53a, 54a).

With respect to bank accounts maintained by the Bankrupt in 1963, disbursements on accounts at the Chase Manhattan Bank, First National City Bank and Bankers Trust Company aggregating $157,512.18 were tabulated. However, the accountant could not determine the nature and purpose of the disbursement of $9,478.71 of checks drawn on the Chase Manhattan Bank and First National City Bank accounts and further, could not identify $148,000.00 of checks issued from Bankers Trust Company inasmuch

as he had not received cancelled vouchers and checks (54a, 55a). Similar tabulations for the years 1964 and 1965 were made, revealing that in 1964 the Bankrupt issued $11,438.25 in checks of which the nature and purpose of checks aggregating $10,5[illegible]4.10 could not be ascertained (56a, 57a). In 1965, the Bankrupt issued $410.53 of checks and the accountant could not identify the nature or purpose of $310.18 (57a, 58a). The total of all checks issued by the Bankrupt during the period of January 1, 1960 to March 1, 1965, for which the accountant could not determine the nature or the purpose of the disbursements, aggregated $2,331,578.41 (58a). The accountant had computed the total deposits made by the Bankrupt during the year 1960 from bank statements, duplicate deposit slips and cancelled checks marked in evidence. He testified that the total deposits for the year 1960 aggregated $437,450.58 of which the nature and source of $414,471.13 remained undetermined (67a, 68a). For the year 1961, the total deposits on the Bankrupt's bank statements reflected $1,518,705.17 of which the nature and source of $166,307.06 could be determined, leaving $1,352,398.11 not subject to determination (68a). For the year 1962, deposits were made to the Bankrupt's bank accounts aggregating $1,306,227.93 but the source and nature of $891,454.31 of such deposits could not be ascertained (68a, 69a). For the year 1963, deposits

aggregated $167,918.15 but $425.00 was identifiable, leaving the nature and source of $167,493.45 undetermined (69a). For the years 1964 and 1965, the accountant could not determine the nature and source of any deposits made by the Bankrupt (69a, 70a). Summarizing his findings with respect to the period January 1, 1960 through March 4, 1965, the latter date being the voluntary petition date, the accountant testified (70a, 71a) that he could not determine the souce and nature of monies received by the Bankrupt and deposited into his bank account of $2,843,126.31 though he had examined the records submitted by the Bankrupt relevant to Tracon Corporation, and he could not find any reference of any transactions between the Bankrupt and Century Industries, Inc. (74a).

The accountant's testimony included an analysis of the claims of various creditors scheduled by the Bankrupt in his schedules in bankruptcy. The claim of Bankers Trust Company scheduled by the Bankrupt as a creditor in the sum of $6,996.17 as of November 3, 1963, could not be determined from the Bankrupt's available books and records, nor was there any record of any obligation to Michael Berlin as of November 13, 1963, in the sum of $4,000.00 (75a, 76a). Numerous instances were referred to by the accountant wherein he could not determine the amounts due various creditors from the available books and records of

the Bankrupt. Century Industries, Inc. and Chemical Bank transactions could not be determined from a review of the books, records and other documents (75a-81a).

A clear indication of the paucity of records of the Bankrupt, was his statement of affairs, which indicated that the Bankrupt maintained bank accounts at American Trust Company, Manufacturers Hanover Trust Company, Bank of Bellwood, Franklin National Bank and Bankers Trust Company. The accountant testified (52a, 53a) that bank statements and other records of said accounts were missing. The available records relative to Kings County Trust Company indicated bank statements for the period August 31, 1960 through November 30, 1960 and for December 30, 1960 to March 30, 1961, but missing records for the interim periods (84a). There were no bank statements of the Bankrupt's First National City Bank account nor were there any records relating to the Greenwich Savings Bank account. (82a).

The accountant gave the Bankrupt the benefit of disbursements which had been drawn for personal living expenses and did not include same in his tabulation of deficiency of assets to meet liabilities. He testified (142a, 143a) that he had asked the Bankrupt for all of his records and that the only stock confirmation folder that he had was one involving Tracon Corporation for the earlier years in which the investigation

was made but that he had nothing with respect to Century Industries, Inc. Despite the conservative approach taken by the Trustee's accountant, of some $3,500,000 deposited by the Bankrupt from 1960 to 1965, the source of $2,800,00 could not be identified. Furthermore, of some $3,000,000 withdrawn by the Bankrupt, the nature and purpose of some $2,300,000 could not be determined (350a).

The trial of the Trustee's specifications objecting to the discharge of the Bankrupt commenced in 1969, following examinations conducted of the Bankrupt. The length and complexity of these examinations was, to a great extent, occasioned by the condition of the Bankrupt's records (366a). Furthermore, additional delays were the result of the Bankrupt's eleventh hour substitution of counsel (366a).

On December 3, 1973, the Bankruptcy Judge filed his decision denying the Bankrupt's discharge (9a, 340a-358a), however, the order implementing the decision was stayed for almost a year and one-half by the Bankrupt's appeal (367a). The notice of appeal to the District Court was filed in March, 1975 but the Bankrupt was dilatory in not perfecting his appeal and the Trustee moved to dismiss the appeal for lack of prosecution thereof. (10a).

On October 7, 1976, the District Court affirmed the decision of the Bankruptcy Judge, holding that the Bankrupt was properly denied a discharge pursuant to Section 14c(2) of the Bankruptcy Act, 11 U.S.C. Section 32c(2). The District Court's decision held that the Bankrupt was not unduly prejudiced by the length of his bankruptcy proceedings, since much of the delay was occasioned by the Bankrupt's own activity.

ARGUMENT

POINT I

THE BANKRUPT WAS REQUIRED TO KEEP AND PRESERVE RECORDS FROM WHICH HIS FINANCIAL TRANSACTIONS AND FINANCIAL CONDITION COULD BE ASCERTAINED.

The relevant provision of the Bankruptcy Act, pursuant to which the Bankrupt herein was denied his discharge, is Section 14c(2), 11 U.S.C. Section 32c(2), which provides:

> "c. The Court shall grant the discharge, unless satisfied that the bankrupt has *** (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained, unless the Court deems such acts or failure to have been justified under all the circumstances of the case; *** <u>Provided, that if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed any of the acts, which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts, shall be upon the bankrupt.</u>" [Emphasis supplied]

As the foregoing statutory language indicates, it is the books and records of the Bankrupt that are to be "kept or preserved" and not those of an unrelated entity. The mere fact that third party creditors of the Bankrupt may have

maintained books and records depicting their transactions with him is not sufficient to absolve the Bankrupt of his duty to keep books and records. See, In re Slutzkin, 60 F.Supp. 567 (E.D.N.Y. 1945); In re Knapp, 309 F.2d 479 (2nd Cir. 1968).

Moreover, the standard imposed by Section 14c(2) for the maintenance of books and records is not the objective reasonable man standard. Rather, it is an individualized, subjective standard. The language of the District Court opinion accurately describes this standard (362a):

> "Section 14c(2) has been construed to require that books and records be kept in a manner appropriate to the bankrupt's business. In re Northridge, 53 F.2d 858 (S.D.N.Y. 1931). What will justify a failure to keep adequate records depends on the extent and complexity of the bankrupt's business. Baker v. Trachman, 244 F.2d 18, 20 (2nd Cir. 1957); White v. Schoenfeld, 117 F.2d 131 (2nd Cir. 1941). Where the bankrupt was involved in many transactions of an extensive character, a substantially accurate and complete record of his affairs is a prerequisite to his discharge. In re Underhill, 82 F.2d 258 (2nd Cir. 1936), cert.denied sub nom. Underhill v. Lent, 299 U.S. 546 (1936).
>
> The proper standard to use in applying Sec. 14c(2) is not a reasonable man standard; rather, it is an individualized one, taking into account the practical problems of what can be expected from the type of person and the type of business involved. Morris Plan Industrial Bank of New York v. Oreher, 144 F.2d 60, 61 (2nd Cir. 1944)."

The rationale underlying the requirement that a bankrupt "keep or preserve" books and records was elaborated upon in Matter of Underhill, supra, at page 260:

> "The purpose and intent of Section 14b of the Bankruptcy Act is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs. It was never intended that a bankrupt after failure, should be excused from his indebtedness without showing an honest effort to reflect his entire business and not a part merely. To be sure, there may be records which are not books; but it is intended that there be available written evidence made and preserved from which the present financial condition of the bankrupt, and his business transactions for a reasonable period in the past may be ascertained. Records of substantial completeness and accuracy are required so that they may be checked against the mere oral statement or explanation made by the bankrupt."

The honesty of the Bankrupt is no justification for the failure to keep or preserve records. See, White v. Schoenfeld, supra; In re Herzog, 121 F.2d 581 (2nd Cir. 1941), Cert. denied, 315 U.S. 807 (1942). The requirement of keeping correct and complete accounts is one imposed by a statute granting bankrupts the benefits conferred by a discharge and as such is a prerequisite to a discharge and should be rigidly enforced. See, Matter of Sims, 213 F. 992 (N.D. Ga. 1914) wherein the Court referred to In re Hanna, 168 F 238 (2nd Cir. 1909) and quoted at page 994:

> "A provision intended to insure the keeping of correct and complete accounts should be rigidly enforced."

The facts sub judice reveal that the Bankrupt engaged in complex financial transactions involving large sums of money (363a). Additionally, these transactions involved, in a rather intricate fashion, the interrelationship of the Tracon Corporation and Century Industries, Inc. both of which served as financial factors or banks for the securities transactions of the Bankrupt (207a). Thus, the business of the Bankrupt was not that of a mere wage earner, he was in business, earning fees, trading in substantial security transactions and acting as a "business broker" (350a). Furthermore, the trier of fact found the Bankrupt to be "a highly articulate man, with considerably more than average intelligence and with an understanding of the securities industry." (350a).

Notwithstanding the complexity of the Bankrupt's business transactions and his apparent degree of sophistication, the books and records delivered to the Trustee were so devoid of substantive and informative content that the Trustee's accountant was unable to ascertain the financial transactions or financial condition of the Bankrupt from these incomplete records and memoranda which the Bankrupt caused to be turned over and the Bankrupt offered no explanation. In Burchett v. Myers,

202 F.2d 920, 926, 927 (9th Cir. 1953), the Court stated:

> "It has been held that where a competent accountant cannot determine a bankrupt's financial condition, a discharge should be denied."

See, <u>In re Miller</u>, 5 F.Supp. 913 (D.C. Md. 1934); <u>In re Arnold</u>, 1 F.Supp. 499 (D.N.H. 1932).

In light of all of the foregoing, appropriately considering the factual circumstances of the within case as it affects the standard to be imposed relative to the statutory requirement of Section 14c(2), the Bankruptcy Judge found (351a):

> "...the bankrupt's carelessness and loose practice in keeping and preserving adequate records cannot be condoned on the grounds of ignorance, illiteracy, nor on any other recognizable ground."

The aforesaid finding, fully and specifically affirmed by the District Court (363a), demonstrates conclusively that the Trustee satisfied his statutory burden. This burden, imposed pursuant to the proviso of Section 14c of the Bankruptcy Act mandates that the burden of proof is initially upon the objector to show that there is reasonable cause to believe that the specification of objection to discharge is true. However, once the objector has shown reasonable grounds to believe that the Bankrupt has committed the act, the burden is upon the Bankrupt to prove "that he has not committed any of such acts" as would bar a discharge. See, <u>Matter of Margolis</u>, 23 F.Supp. 735 (S.D.N.Y.

1937); In re U. S. Restaurant & Realty Co., 187 F. 118, 120 (2nd Cir. 1911); In re Northridge, 53 F.2d 858 (S.D.N.Y. 1931).

POINT II

THE BANKRUPT HAS FAILED TO SUSTAIN THE BURDEN OF PROOF THAT HE HAS NOT COMMITTED SUCH ACTS AS WOULD BE A BAR TO DISCHARGE.

As noted in Point I hereinabove, once the objector has satisfied his initial burden of proof, the burden falls upon the Bankrupt to prove that he has not committed acts forbidden by Section 14c(2) of the Bankruptcy Act. The Bankrupt, in an effort to meet the aforesaid burden, which is statutorily imposed by the proviso to Section 14c(2), has posited two alternative theories, both of which were argued before the trier of fact.

The Bankrupt's initial argument, renewed in his brief to this Court (Point II), essentially involves the assertion that he maintained a sufficient set of books and records from which his financial transactions could be understood, but through no fault of his own they were lost in transit. It is submitted that the Bankrupt was not raising a legal jusitification for the failure to produce his books and records, but rather, a factual explanation.

It is axiomatic that credibility is always in issue where factual issues are in dispute. Having had the opportunity to consider the Bankrupt's proffered explanation, in the form of testimony, the Bankruptcy Judge simply did not believe

that the essential records were lost in transit and on that basis found the Bankrupt's assertion "unacceptable" (351a). Furthermore, at no time during the hearings on the specifications did the Bankrupt offer any third party testimony relating to the alleged loss of records. All that was offered was the Bankrupt's bare assertion that the records were lost through no fault of his own. Plainly and simply, the Bankrupt did not set forth a sufficiently credible explanation to rebut the Trustee's case.

The Bankrupt raises the additional argument in his brief (Point I) that the corporate records of Robert A. Martin Associates, Inc. were an adequate substitute for his personal records. This argument, too, was considered by both the Bankruptcy Court and the District Court and found insufficient in light of the particular facts herein involved.

While it is admitted that in proper cases a bankrupt's corporate records may serve as substitutes for his personal records, In re Sandow, 59 F.Supp 782, 784 (S.D.N.Y. 1944), aff'd, 151 F.2d 807 (2nd Cir. 1945); In re Halpern, 387 F.2d 312 (2nd Cir. 1968), this is not such a case. Robert A Martin Associates, Inc. was out of business in 1962 and in liquidation, yet the Bankrupt continued to transact business in 1963, 1964 and 1965.

It is submitted that the Bankruptcy Judge was correct, when, in distinguishing In re Muss, 100 F.2d 395 (2nd Cir. 1938) from In re Halpern, supra, he stated (352a,353a):

> "The testimony very clearly establishes that Robert A. Martin Associates, Inc. had ceased doing business in 1962 and was in the process of liquidation. This is what marks the difference between the instant situation and that presented by In re Halpern, supra. Assuming that the bankrupt could properly satisfy his obligation to record his transactions by entries in the records of the Corporation, there remains $891,454.31 deposited in 1962 and $167,493.45 deposited in 1963 the source of which cannot be determined. It leaves unexplained the nature and purpose of withdrawals aggregating $729,701.14 in 1962, $157,478.71 in 1963, $10,594.10 in 1964, and $310.18 in 1965."

The District Court considered this finding by the Bankruptcy Court in affirming that the corporate records were not adequate substitutes for the Bankrupt's personal records, stating (365a):

> "The bankrupt testified that Robert A. Martin Associates, Inc. ceased doing business in late 1962 or early 1963, that it was in liquidation at that time, and that it engaged in no significant loan or securities transactions after 1962. Consequently the Referee found that the corporate records would be inadequate to explain transactions after 1962. The bankrupt has not directed this Court to any evidence in the record to dispute this finding. Even if the Referee erred in finding that the trustee's accountant examined the corporate records, there is still no evidence that the

> corporate records contained the necessary data pertaining to post-1962 transactions." [Emphasis supplied]

It is submitted that the Bankrupt misapprehends the import of both the Bankruptcy Judge's and the District Court's decisions. In both instances the decisions elucidate the fact that the Bankrupt failed to satisfy the burden imposed upon him by the proviso to Section 14c(2) of the Bankruptcy Act. The Bankrupt offered no more than a bare assertion that his corporate records contained a complete record of his financial transactions. There was never, at any time, any evidence produced by the Bankrupt to substantiate this allegation, notwithstanding the fact that all of the records delivered to the Trustee were made accessible to him (269a-273a).

Having failed to substantiate his bare allegation that the corporate records of Robert A. Martin Associates, Inc. were adequate substitutes for his personal records, the Bankrupt failed to sustain the burden of proof imposed upon him by Section 14c(2). As stated in the Bankruptcy Judge's decision (358a):

> "The trustee has shown to my satisfaction that the bankrupt has committed acts which would bar his discharge, pursuant to Bankruptcy Act §14c(2), and the bankrupt has failed to sustain the burden of proving that he has not committed such acts (Bankruptcy Act §14c proviso)..." [Emphasis supplied]

In summary, it was the Bankrupt's burden to demonstrate, to the Referee's satisfaction, that his corporate books were adequate substitutes for his personal records. His failure to sustain that burden mandates that his discharge be denied. See, In re U. S. Restaurant & Realty Co., *supra*.

POINT III

THE LOWER COURT DECISION SHOULD BE AFFIRMED UNLESS "CLEARLY ERRONEOUS."

Rule 752 of the Rules of Bankruptcy Procedure, fashioned after Rule 52 of the Federal Rules of Civil Procedure, applies to the instant appeal. Insofar as is pertinent, Rule 752 provides:

> "In all matters tried upon the facts without a jury***the court shall find the facts specially***Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.***"

The Bankrupt proffered factual explanations for both the loss of his personal records and for the assertion that his corporate records were adequate substitutes for the lost personal records. However, as noted hereinabove, at no time did the Bankrupt introduce any substantive evidence to support the aforesaid allegations.

Having had the opportunity, in the course of a full trial, to hear all of the evidence, observe the witnesses and judge their credibility, the Bankruptcy Judge found that the Bankrupt had committed acts proscribed by Section 14c(2) and as such his discharge was denied. Insofar as that determination was based upon facts in dispute, the Lower Court, in its

role as trier of fact should not have its decision reversed by an appellate tribunal unless that decision was "clearly erroneous." It is submitted that the decision was fully supported by the evidence and correct.

POINT IV

DELAY IN THE PROCEEDINGS WAS LARGELY ATTRIBUTABLE TO THE BANKRUPT AND AS SUCH ANY UNDUE PREJUDICE WAS SELF-IMPOSED AND FORMS NO BASIS FOR APPEAL.

The Bankrupt filed his voluntary petition in bankruptcy on March 4, 1965. The filing required an amendment to the statement of affairs of the Bankrupt and said amendment was filed on September 9, 1966, after proceedings had been commenced by the Trustee to compel such an amendment.

As detailed in the decision (347a, 348a), a large portion of the essential records of the Bankrupt were not produced for the Trustee's examination into the affairs of the Bankrupt. Without the aid of these records, the Trustee and his counsel and accountants were compelled to conduct extensive examinations before the Bankruptcy Court at the first meeting of creditors, adjourned first meeting of creditors and in Bankruptcy Act Section 21a proceedings, (11 U.S.C. Sec. 44a).

Examinations of the Bankrupt were conducted on May 3, 1965, February 1, 1966, March 4, 1966, May 12, 1966, September 9, 1966, November 10, 1966, December 9, 1966, February 2, 1968, March 1, 1968 and April 4, 1968. Examination of third persons in connection with the Bankrupt's affairs took place on August 25, 1966, September 9, 1966, August 5, 1968 and

October 3, 1968. All of the foregoing examinations were in aid of the Trustee's investigation into the financial transactions and condition of the Bankrupt.

It is submitted that the District Court decision accurately conveys the chronology herein involved (366a, 367a):

> "It is apparent that extensive examinations of the bankrupt and other witnesses were required because of the condition of the bankrupt's records. These examinations were not concluded until October 1968. The bankrupt thereafter substituted counsel and requested an adjournment to enable his new counsel to familiarize himself with the proceedings. The bankrupt's discharge was denied on December 3, 1973, whereupon the bankrupt obtained, over the trustee's objection, an order staying creditors from attempting to collect on their debts pending the outcome of this appeal. <u>The bankrupt delayed this appeal for over a year and a half</u> endeavoring to settle claims of certain creditors. In light of this history, the bankrupt is in no position to argue that he was unduly prejudiced by any procrastination of the trustee." [Emphasis supplied]

Considering the particular facts confronting the Trustee in the case <u>sub judice</u>, it is submitted that he conducted his investigations and examinations into the affairs of the Bankrupt as expeditiously as possible. The blame for the length of these proceedings would fall on the Bankrupt. As such, the Bankrupt cannot be heard to complain that he was "unduly prejudiced" by the delay.

CONCLUSION

Upon the foregoing grounds, and absent a finding that the decision was "clearly erroneous", the decision of the District Court in affirming the Bankruptcy Court's decision denying the Bankrupt a discharge should be affirmed.

Respectfully submitted,

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